Supreme Court, U.S.
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No. 98-980

In The

Supreme Court of the United States

October Term, 1998

LESLY JEAN,

Petitioner,

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, Individually; JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina Police Department, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Delma Collins and James Shingleton respectfully request that the Court deny the Petition of Lesly Jean for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF CASE

A. Statement of Facts

Pursuant to Supreme Court Rule 15.2, Respondents have restated the relevant facts in this action in an effort to correct the numerous mischaracterizations and misstatements of fact in Petitioner's Statement of Facts. Respondents particularly note Petitioner's almost exclusive reliance on the facts as set forth in the Fourth Circuit's panel opinion, which was vacated by the *en banc* court and which contains several factual inaccuracies.[1]

On July 21, 1982 from approximately 3:00 a.m. to 4:15 a.m., Ms. Alice Kathleen Wilson was brutally raped, sexually assaulted and beaten in her bedroom. Ms. Wilson was able to see her assailant's face because of the light shining into her bedroom from the kitchen. Resp. App. 37, J.A. 93.[2] After the rape, a police officer arrived, took a

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[1] Internal Operating Procedure of the Fourth Circuit 40.2, which was in effect at the time, provides that the original judgment and opinion of the Fourth Circuit "are vacated" once a petition for rehearing is granted.

[2] References to the Appendix ("App.") are to the appendix attached to Petitioner's brief. References to Respondents'

brief description of the perpetrator from Ms. Wilson and broadcast it on the police radio; the description was of a black male, five feet eight inches, 160 or 165 pounds, wearing a dark shirt, dark jogging shorts, "high-top" socks and white, high-top tennis shoes. App. 3; J.A. 423, 559. Ms. Wilson also described her assailant as having a slight accent. J.A. 423. At approximately 4:40 a.m., Respondent James Shingleton, a police officer with the City of Jacksonville, North Carolina, stopped a man walking along the highway who fit this general description of Wilson's assailant. After Shingleton questioned him for about one and one-half minutes, the man fled into nearby woods. App. 3. Later that morning, Shingleton described the person he stopped as black, five feet ten inches tall, 170 pounds, close-cut hair and a mustache, and wearing blue shorts, a blue shirt with writing, white knee-high socks, and white tennis high-tops. App. 3; J.A. 429, 595.[3]

Shortly after the rape, Ms. Wilson was taken to the hospital for treatment and then to the police station to give a statement. In this statement, she describes the rapist as a black male, five feet eight inches tall, 165 or

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Appendix ("Resp. App.") are to the appendix attached to this brief. References to the Joint Appendix ("J.A.") are to the joint appendix filed by the parties in the United States Court of Appeals for the Fourth Circuit.

[3] Although Petitioner, quoting from the Fourth Circuit's panel decision, asserts that Wilson's description "did not match, in many respects, that provided by Shingleton" (Petition at 2), the two descriptions given by Wilson and Shingleton before any hypnosis both identify a black male, approximately the same height and the same weight, with dark shorts, a dark shirt, long socks, and white tennis shoes.

170 pounds, muscular, with dark, probably navy blue, shorts, white crew socks, high top sneakers and black "marine" close-cut hair. App. 4; J.A. 436. Later that morning, Ms. Wilson met with an S.B.I. artist to produce a composite sketch of the suspect. She specifically told the artist that her assailant had "light freckling" and a "larger freckle on the left, lower cheek." J.A. 582. However, because the artist's attempts to denote the larger freckle with a black grease pencil "caused the freckle to become too prominent or to become too distinct," the artist simply "left it off" the sketch. J.A. 586.

On July 22, 1982, Respondent Delma Collins, who had attended an eighty-hour training course on hypnosis and was then head of the detective division, hypnotized Shingleton concerning the description of the suspect Shingleton had stopped the day before. Resp. App. 1-4, J.A. 57-60.[4] During this hypnosis session, Shingleton now recalled that the writing on the shirt was a sweat mark instead, that the suspect did not have a mustache and that the suspect's socks had blue stripes. App. 4; J.A. 445, 612. After the hypnosis, Detective Steve Smith, the lead investigator on the case, recorded in his notes that Shingleton's description "matches the one given by victim." App. 4; J.A. 441.[5]

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[4] Petitioner, again quoting from the Fourth Circuit panel opinion, infers that Shingleton was hypnotized in an effort to reconcile the differences between his description and that given by Ms. Wilson. Petition at 3. There is no evidence in the record to support such an assumption.

[5] Petitioner, relying on a factual mistake in the Fourth Circuit's panel decision, erroneously asserts that this statement was contained in *Respondent Collins'* log and that it was the

On July 26, 1982, Chief of Police Roger Halbert, who had seen the S.B.I. composite sketch of the suspect, noticed a man in a donut shop who looked "just like" the sketch; the man was Petitioner Lesly Jean, who was then a marine stationed at Camp LeJeune in Jacksonville. J.A. 107. Chief Halbert called Officer Shingleton to the donut shop, Shingleton identified Petitioner Jean as the person he had stopped just after the rape, and Jean was arrested. App. 4.[6] Detective Smith interviewed Jean and, after Jean's consent, searched his locker and laundry bag at the marine base. Smith confiscated a pair of white high-top tennis shoes, dark blue athletic shorts, and a blue t-shirt. App. 5. Jean was later released.

On July 27, 1982, Wilson returned to the police station to view a photo lineup that included Jean's picture. Although Wilson could not make a positive identification at that time, she called Detective Smith the next day because one of the photos had made her "feel sick." App.

"only notes recorded" after Shingleton's hypnosis. Petition at 4. The record clearly reveals that the statement was recorded by Officer *Smith* in his notes (J.A. 441) and that Respondent Collins completed a Hypnosis Information Worksheet on the results of Shingleton's hypnosis. J.A. 445.

[6] Petitioner asserts that at the time of his arrest, he had "no freckles or remarkable spots on his face." Petition at 4, n.1. As noted above, Ms. Wilson described a large "freckle" on Jean's left cheek to the S.B.I. artist on the day of her attack, before any hypnosis. During Jean's criminal trial, Ms. Wilson specifically pointed out this freckle to the court; Jean admitted at trial that he had such a mark but claimed he learned of its existence just "the other day." J.A. 527-28, 690.

5, J.A. 442, 449.[7] She returned to the station and pointed to Jean's photo as the one who made her feel ill. J.A. 449. On July 30, 1982, on the recommendation of Detective Smith, Respondent Collins hypnotized Wilson to determine if she could recall anything else about the photo that made her feel sick. During this hypnosis session, only three pieces of information were added to Wilson's description, that the assailant's eyes were gray, that she remembered his shoes had white shoelaces and a Nike emblem, and that the accent she had earlier described to the police might be Puerto Rican. App. 5; J.A. 458.[8] In fact, Detective Smith and Officer Collins considered the session to be unproductive because of the lack of new information. Resp. App. 7; J.A. 63; App. 5. On August 4, 1982, Ms. Wilson positively identified Jean's voice as her

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[7] Again, Petitioner misstates the facts, asserting that on the second day Ms. Wilson stated only that Jean's eyes looked "haunty." Petition at 5.

[8] Petitioner makes multiple misstatements concerning Wilson's hypnotic session: (1) he cites as "new information" revealed during the hypnosis Wilson's belief that the shorts were a solid dark color without any stripes; the Hypnosis Information Worksheet contains no reference to stripes and Wilson had already, pre-hypnosis, identified the shorts as dark, probably blue; (2) Petitioner cites as "new information" Wilson's statement during hypnosis that Petitioner may have had freckles. Ms. Wilson, on the day of the attack and before hypnosis, had already told the S.B.I. artist that Petitioner had light freckling on his face and a larger freckle on his left cheek, which Ms. Wilson later identified in court (J.A. 458, 527-28, 586); and (3) he cites as "new information" Wilson's belief that her attacker had an accent. However, Ms. Wilson informed Officer Pullicino shortly after the assault that her assailant had a "slight accent." (J.A. 423). Petition at 5.

rapist[9] and, on September 17, 1982, identified Plaintiff out of a three-person live lineup. J.A. 136-137; App. 6.

Petitioner was indicted in October 1982 for rape and first degree sexual offenses. App. 6. Respondents informed the prosecutor, Walter Vatcher, well before trial that Ms. Wilson and Officer Shingleton had been hypnotized and, as Mr. Vatcher admits, turned over all evidence that he requested from them. Resp. App. 43-46. Mr. Vatcher apparently never asked the officers for any materials related to the hypnoses, such as the Hypnosis Worksheets or the tape-recordings of the hypnoses sessions. Resp. App. 43-46, App. 22. Vatcher disclosed to defense counsel the fact that Shingleton and Wilson were hypnotized prior to Ms. Wilson's cross-examination at trial; he never disclosed the recordings of the hypnotic sessions, despite general pretrial discovery requests and a more specific request by defense attorneys at trial. App. 6; J.A. 163.

Petitioner's counsel at the criminal trial cross-examined both Shingleton and Wilson concerning the hypnoses

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[9] Petitioner asserts that Ms. Wilson "tentatively selected two possible voices" and "after more play backs and delay," identified Jean's voice. Petition at 5-6. The record does not support these allegations. Ms. Wilson identified one voice, that of Petitioner, on August 4, 1982 after listening to the tapes "two or three times." J.A. 461, 563-566; App. 6. On August 10, 1982, Ms. Wilson called Detective Smith to check on the case; when she learned that Officer Smith had not considered her statement on August 4 as a positive identification of Jean's voice, she explained that she had meant her August 4 action to be a positive and conclusive identification of Jean's voice as that of her assailant. J.A. 565-566; App. 6.

and the results of the hypnoses. Shingleton testified that his description of the suspect changed in certain respects under hypnosis and that he was not "absolutely sure" of his in-court identification of Petitioner. J.A. 612-615. On December 5, 1982, Plaintiff was convicted of rape and sexual assault and sentenced to two consecutive life terms.

B. Proceedings Below

Petitioner claims that the United States District Court for the Eastern District of North Carolina, in its decision granting Respondents qualified immunity, determined that Petitioner's right to have the government disclose "exculpatory evidence" regarding hypnosis-related testimony was not clearly established in 1982. Petition at 9. The District Court, however, specifically found that the evidence at issue was *not* exculpatory but had impeachment value only. App. 72. Petitioner also mischaracterizes numerous aspects of the Fourth Circuit's *en banc* decision, which misstatements will be addressed below.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT'S APPROACH IN DETERMINING WHAT SOURCES OF LAW SHOULD ORDINARILY BE USED TO DECIDE WHETHER A RIGHT WAS CLEARLY ESTABLISHED DOES NOT CONFLICT WITH ANY SUPREME COURT CASE OR WITH ANY DECISIONS OF OTHER CIRCUIT COURTS

In its *en banc* opinion, the Fourth Circuit adopted an "approach" for determining what sources of law a court

generally may consider in deciding whether a right was clearly established for qualified immunity purposes: "ordinarily, therefore, courts in this circuit need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose to determine whether a right was clearly established at a particular time." App. 18. The Fourth Circuit's rationale for adopting this approach is firmly grounded in the Supreme Court's own recognition that public officials should be shielded from liability for "judgment calls made in a legally uncertain environment." *Ryder v. United States*, 515 U.S. 177, 185 (1995). As the Fourth Circuit cogently explained:

> The very immensity of American jurisprudence creates the distinct likelihood that jurisdictions will offer conflicting opinions over how government officials should carry out their tasks. To hold officials responsible for sorting out these conflicts, without any guidance about what jurisprudence to follow, could generate widespread confusion over the scope of official obligations. An unbounded legal universe would give rise to guessing games over whether this or that decision in this or that jurisdiction created a clearly established right. Such a limitless universe would also give judges broad latitude to second-guess the actions of officers on the spot.

App. 17-18 (cite omitted). Contrary to Petitioner's arguments, the Fourth Circuit's approach creates no conflict with other circuit courts or with any Supreme Court opinion.

First, Petitioner attempts to create a conflict where none exists by exaggerating the differences between the

circuit courts in their handling of this issue – what law should be considered in determining whether a right was clearly established at the time of the conduct in question. Respondents freely acknowledge that the circuit courts have formulated standards which differ slightly from each other. Like the Fourth Circuit, the Eleventh Circuit looks to decisions of the United States Supreme Court, its own circuit or the highest court of the state in which the case arose. *See Jenkins v. Talladega City Board of Education*, 115 F.3d 821, 826 n.4 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 412 (1997). The Second and Sixth Circuits rely on case law of the Supreme Court and courts within their own circuit. *Russell v. Selsky*, 35 F.3d 55, 57 (2nd Cir. 1994); *Ohio Civil Service Employees Assoc. v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988). The Tenth Circuit "ordinarily" bases its judgment on Supreme Court or Tenth Circuit precedent "or the clearly established weight of authority from other courts." *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992).

The Ninth Circuit has stated that it looks "to Supreme Court precedent and then to lower court decisions with an eye toward whether the Supreme Court would adopt their analysis." *Ortega v. O'Connor*, 146 F.3d 1149, 1157 (9th Cir. 1998). The Seventh and Eighth Circuits seem to take a broader view, looking at all relevant case law but requiring a sufficient consensus of that case law. *Henderson v. DeRobertis*, 940 F.2d 1055, 1058-59 (7th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992); *Buckley v. Rogerson*, 133 F.3d 1125, 1129 (8th Cir. 1998). Finally, the Fifth Circuit has stated that Supreme Court and Fifth Circuit cases "will loom largest in our inquiries," but that the court has some discretion to look to other decisions

depending on the circumstances of each case. *Doe v. State of Louisiana*, 2 F.3d 1412, 1416 n.8 (5th Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994).[10]

These marginally different standards simply represent variations on a common theme and do not evince a "hopeless split" among the circuits, as Petitioner contends. Petition at 15. The common theme is the Supreme Court's general standard that "in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Beyond that, the Supreme Court has directed only that "a court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents.' " *Elder v. Holloway*, 510 U.S. 510, 516 (1994), *quoting Davis v. Scherer*, 468 U.S. 183, 192 n.9 (1984). Thus, the Court presumably has left it up to each

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[10] Petitioner mischaracterizes two decisions by circuit courts in his effort to manufacture dissension among the ranks on this issue. Petitioner states that the First Circuit *held* that a clearly established right may be found even where the Supreme Court and the circuit court had never addressed the issue. Petition at 14. In *Soto v. Flores*, 103 F.3d 1056, 1065 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 71 (1997), the court merely cited a *treatise* with a statement to that effect. The *Soto* court found, however, that the right in that case was *not* clearly established, in part because the First Circuit had not addressed the contours of the right at the time of the conduct in question. Similarly, Petitioner asserts that in *Pro v. Donatucci*, 81 F.3d 1283 (3rd Cir. 1996), the court found a right to be clearly established where that court had not ruled on the issue and there was a "split" on the issue in other circuits. In that case, however, two local district court cases had decided the issue and the "split" in the circuits consisted of only one other circuit.

circuit court to define for itself what those relevant precedents are, as long as the courts remain within the bounds of *Anderson*'s instruction that the officials must have sufficient notice from the "pre-existing law" that their conduct was unlawful.

None of the circuits has strayed from these basic Supreme Court guidelines. Each has formulated a rule, although each one slightly different, to guide its courts in determining when the "pre-existing law" was established clearly enough that those public officials within the circuit would know that their conduct was unlawful. Indeed, there is no need for the Supreme Court to set forth a universal rule as to the precedents that may or must be considered in determining clearly established law. As long as government officials know the rule that their own circuit has adopted on this issue, they have sufficient notice as to the sources of law that govern their conduct. Thus, no split exists among the circuits that needs to be resolved by the Supreme Court.[11]

Second, Petitioner attempts to create a conflict where none exists between the Fourth Circuit's approach and this Court's decision in *United States v. Lanier*, 117 S. Ct.

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[11] Petitioner attempts to portray the Fourth Circuit's rule as way out of line with that of other circuits. As set forth above, however, it is identical to the rule that has long been established in the Eleventh Circuit and is very similar to the rules of the Second and Sixth Circuits. Likewise, Petitioner's characterization of the Fourth Circuit's approach as "rigid" and "formalistic" ignores the Fourth Circuit's caveat that the rule should "ordinarily" apply, clearly leaving open the possibility that circumstances might warrant the application of a different rule. Petition at 15; App. 18.

1219 (1997). In *Lanier*, the Supreme Court rejected the Sixth Circuit's determination that *only* Supreme Court precedent could clearly establish the law for purposes of 18 U.S.C. § 242. The Court analogized that, in the qualified immunity context under 42 U.S.C. § 1983, it had "referred to decisions of the Courts of Appeals when enquiring whether a right was 'clearly established.' " *Id.* at 1226. Although the Supreme Court validated the Sixth Circuit's "concern" that disparate decisions in different circuits might leave the law "insufficiently certain," it declined to create a "categorical rule" that only Supreme Court precedents could be used to provide "fair warning" under Section 242. *Id.* at 1226-27. Thus, the *Lanier* decision held simply that a court under 18 U.S.C. § 242 should not rely solely on Supreme Court precedent in determining whether the defendant had received "fair warning." The Court implied that circuit court opinions could be relied on in addition to Supreme Court precedent but, significantly, it did *not* dictate for the lower courts exactly which courts or which jurisdictions they could and could not follow, even though it had every opportunity.

This unwillingness to set one absolute standard as to the body of case law that may be considered for "fair warning" under Section 242 in no way indicates a condemnation of the Fourth Circuit's approach for determining "clearly established" law in the qualified immunity context. As with *Lanier*, the Supreme Court has had many opportunities in Section 1983 cases to create a "categorical rule" for the lower courts to follow in defining the sources of law that may be considered in enquiring whether a right was "clearly established." Its failure to do so supports the argument that the Supreme Court is

allowing the circuit courts to create their own standards, as long as those standards provide sufficient notice to public officials as to the lawfulness of their conduct. The Fourth Circuit's standard, which is almost identical to that of several other circuits, meets this criterion.[12]

II. THE FOURTH CIRCUIT IN THIS ACTION CORRECTLY APPLIED *ANDERSON V. CREIGHTON* IN DEFINING THE RIGHT AT ISSUE WITH THE REQUIRED LEVEL OF PARTICULARITY

Petitioner, again, attempts to create a conflict where none exists, this time by arguing that the Fourth Circuit, in opposition to several circuits and *dicta* from the Supreme Court, has set forth a rule requiring an exact "case on point" before it will find a right "clearly established" under the qualified immunity analysis. The

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[12] Indeed, the Eleventh Circuit, which has adopted the same approach as the Fourth Circuit for determining relevant precedents, has already considered and dismissed this same argument concerning *Lanier*. In *Jenkins v. Talladega City Board of Education*, 115 F.3d 821, 827 n.4 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 412 (1997), the court rejected the argument that *Lanier* created "tension" with the Eleventh Circuit's "decisional law deeming relevant solely in-circuit precedent." As the Eleventh Circuit noted, "the Supreme Court in Lanier simply did not address the extent to which decisions of the 'lower courts' must, should, or may be considered in deciding whether a constitutional right has been clearly established, nor did it identify any impropriety in considering only the decisions of the circuit or highest court of the state in which the relevant events took place. We therefore do not construe Lanier as being in conflict with our precedent regarding the relevant decisional law to which we must look in analyzing a claim of qualified immunity." *Id.*

Fourth Circuit's opinion in this case establishes no such rule and adheres strictly to the Supreme Court's directions in *Anderson v. Creighton*, 483 U.S. 635 (1987).[13]

The Supreme Court's mandate in *Anderson* concerning the process by which a court should determine whether the law was "clearly established" bears repeating here, especially in light of Petitioner's charge that the Fourth Circuit's opinion reveals "a complete misunderstanding about the nature of qualified immunity" (Petition at 19):

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of Harlow . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been

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[13] Petitioner declares that "in multiple citations throughout the majority opinion, the Fourth Circuit clearly requires a case on point for § 1983 liability to ever attach." Petition at 17-18. It is indicative of the weakness of this argument that Petitioner neither quotes from nor cites to *any* of these "multiple citations." They simply do not exist.

> 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 639-40.

The Fourth Circuit's opinion in this case illustrates its understanding of and allegiance to these principles. The *en banc* decision states that *Anderson* "requires that the right be defined at a high level of particularity" but "of course" does *not* require "that a prior case have held identical conduct to be unlawful." App. 16, 19. Nor does the Fourth Circuit itself require, suggest or even intimate that a case exactly on point is needed for a right to be clearly established. The issue in this case was whether a police officer in 1982 would know that he had a constitutional duty to provide evidence to prosecutors. The Fourth Circuit's analysis that no relevant case law had clearly established this proposition did not reject factually similar cases in a zealous quest for the perfect "on all fours" case. The court's review of case law existing in 1982 revealed that decisions had established a *prosecutor's* duty to disclose evidence but that no cases had held that a *police officer* also had that constitutional duty. App. 19-21. As the Fourth Circuit explained, "police officers in 1982 could not have been expected to survey decisions involving prosecutors' failures to disclose evidence to the

defense and conclude that, by analogy, they bore an independent constitutional duty to provide evidence to prosecutors." App. 19.[14] Thus, the Fourth Circuit made a well-reasoned decision that cases bearing on a prosecutor's duty to disclose evidence did not reach the level of factual particularity which the *Anderson* decision requires. This decision exhibits no "misunderstanding" about the qualified immunity analysis and needs no review by this Court.[15]

Not only is the Fourth Circuit's decision that the law was not clearly established sound under *Anderson* principles, it also creates no conflict with the law of any other circuit or with any ruling of the Supreme Court. Petitioner cites three court of appeals cases for the proposition that "numerous circuits have held it is not necessary there be a specific holding in order to find a constitutional rule has been 'clearly established.' " Petition at 18. All three cases, however, require some pre-existing law to exist which clearly establishes the right in question; they,

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[14] Indeed, the Fourth Circuit noted that in this case Respondent police officers turned over all the evidence the prosecutor requested and that it was the *prosecutor's* duty under *Giglio v. United States*, 405 U.S. 150 (1972), to ask the police officers for any materials related to the hypnoses. App. 22.

[15] Supreme Court Rule 10 provides that "a petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Petitioner cannot dispute that the Fourth Circuit properly stated Supreme Court case law as to when a right is clearly established. Even if Petitioner's contention that the Fourth Circuit misapplied that law under the facts of this case had merit, such a fact-specific argument does not present a question for review by this Court.

like the Fourth Circuit and the Supreme Court, simply do not require a case directly on point.

Nor does the Fourth Circuit's analysis of clearly established law conflict with this Court's *dicta* in *Lanier*. In *Lanier*, this Court reiterated *Anderson*'s warning that liability should attach in the qualified immunity context "only if 'the contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " 117 S. Ct. at 1227, *quoting*, *Anderson*, 483 U.S. at 640. It then noted that different factual circumstances may necessitate different levels of factual particularity to satisfy *Anderson*'s standard:

> In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. See, e.g., Mitchell v. Forsyth . . . But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.

Id. No conflict exists between this language and the Fourth Circuit's analysis in this case because the Fourth Circuit applied the level of "prior factual particularity" necessary under the circumstances. The present case is not one in which, under *Lanier*, a "general constitutional rule" applied "with obvious clarity" to the specific conduct in question. Indeed, the issue of whether police officers in 1982 had a constitutional duty to disclose hypnosis-related evidence to the prosecution has been

debated in this and related cases for some fourteen years, with various state and federal courts split as to whether or not Respondents violated the constitution in failing to disclose the evidence. App. 73. *See Santamorena v. Georgia Military College*, 147 F.3d 1337, 1340 n.6 (11th Cir. 1998) (noting that *Lanier*'s statement that a general constitutional rule may apply involves only "exceptional cases" which "rarely arise").

Finally, Petitioner extrapolates the Fourth Circuit's reasoned and rational approach in this case to a bizarre world where public officials commit heinous constitutional offenses and go laughingly free from liability because no exact case on point has addressed that particular egregious conduct before. Petition at 20. Petitioner's scenario might very well be the *Lanier* case where a general constitutional rule applies "with obvious clarity" and thus there is no need for a court to look for case law with a high degree of "prior factual particularity." *Lanier*, 117 S. Ct. at 1227. Several federal courts have recognized that conduct that "shocks the conscience" is so patently egregious that the constitutional right it violates is necessarily clearly established. *Grendell v. Gillway*, 974 F. Supp. 46, 52 (D. Me. 1997); *Anderson v. Romero*, 72 F.3d 518, 526-27 (7th Cir. 1995); *Fernandez v. Leonard*, 784 F.2d 1209, 1216 (1st Cir. 1986).

That scenario is not this case, where Respondents believed that the hypnoses sessions did not create any exculpatory evidence (J.A. 63, 75-76), where a federal district court judge found the evidence to have impeachment value only (App. 72), and where Petitioner's criminal trial attorneys admitted that, after hearing Ms. Wilson's trial testimony concerning her hypnosis, they

did not even move to re-open voir dire on the identification issue because they believed that "no new evidence [was] developed" during her testimony. J.A. 716. Nor is there any indication by the Fourth Circuit in this decision or any other decision that it would require an exact case on point to establish Section 1983 liability for any situation, much less one where the conduct was patently egregious. Petitioner's argument that the Fourth Circuit has created a rule requiring a case directly on point misreads the court's careful application of *Anderson* to the facts of this case.

III. THE FOURTH CIRCUIT DID NOT ERR IN HOLDING THAT THE LAW WAS NOT CLEARLY ESTABLISHED IN 1982 THAT POLICE OFFICERS HAD A CONSTITUTIONAL DUTY TO TURN OVER THE EVIDENCE AT ISSUE TO THE PROSECUTOR

Petitioner brands as error the Fourth Circuit's determination that, as of 1982, the relevant law was not clearly established that a police officer had a constitutional duty to turn over the evidence at issue in this case to the prosecution. A careful examination of Petitioner's argument as well as the legal history of this case reveals that the Fourth Circuit committed no error.

Petitioner's argument itself supports a finding of no error. Petitioner contends that "in conclusion, *Brady*, *Giglio*, and *Barbee* directly control this case. As of 1982, the police were under a long-established duty to disclose

exculpatory information to the prosecutor." Petition at 24.[16] Yet, only five paragraphs earlier, Petitioner himself admits that *Brady* and *Giglio* involved the *prosecutor's* duty to disclose exculpatory information to the defense, not the police officer's duty. Petition at 20-21. As Petitioner correctly notes:

> In the case at bar, however, it is not the prosecutor's decision to withhold exculpatory evidence that is at issue; rather it is the decision of the investigating police officers which is in question. Thus, *the issue narrows* to whether in 1982 a police officer's failure to disclose information to prosecutors, as derived from *Brady v. Maryland*, was clearly established.

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[16] Throughout his brief, Petitioner consistently refers to the evidence that was not disclosed as "exculpatory." Petition at 19, 21, 23-24. Respondents argued in the federal district court and before the Fourth Circuit that the evidence had impeachment value only and therefore did not fall under the rule of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, the hypnosis testimony and accompanying records in no way exculpated Petitioner; they served only as a possible means of impeaching the testimony of Ms. Wilson and Respondent Shingleton as to the differences in their pre- and post-hypnosis descriptions. App. 72. Thus, Respondents object to Petitioner's continued characterization of the evidence at issue as exculpatory. The *en banc* opinion, however, does not address this difference or rely on it in its analysis of whether the right of disclosure was clearly established. It correctly focuses on the fact that, in 1982, only the prosecutor's and not the police officer's constitutional duty to disclose hypnosis-related evidence to the defense had been established. App. 19-24.

Petition at 21 (emphasis added). That is exactly the point that the Fourth Circuit made; *Brady* and *Giglio* do *not* control this case because they involve the prosecutor's duty to disclose evidence and do not address the police officer's duty. App. 19. The factual particularity required by *Anderson* is not satisfied.

That leaves Petitioner, under his own argument, with the lone case of *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964), as clearly establishing a police officer's duty to disclose evidence to the defense. The Fourth Circuit distinguished *Barbee* as follows:

> *Barbee* did not require police, as a constitutional matter, to furnish evidence to a prosecutor. Instead, as this circuit later explained, *Barbee* held simply that the police's knowledge of such evidence would be imputed to the prosecutor in deciding whether the prosecutor had fulfilled his *Brady* duties . . . Thus, while prosecutors are not relieved of their *Brady* duties for failing to disclose material evidence known only to the police, police officers who in 1982 failed to give such evidence to prosecutors did not themselves violate a clearly established constitutional right.

App. 20.

That the *Barbee* decision did not clearly establish the right in question is also notably illustrated by the legal history of this action. In October 1995, the United States District Court for the Eastern District of North Carolina granted Respondents qualified immunity, holding that *Brady* was not controlling and that the right in question was not clearly established until the 1985 Supreme Court decision of *United States v. Bagley*, 473 U.S. 667 (1985).

App. 71-73. Reversing this decision in March 1997, the Fourth Circuit panel opinion held that the right was clearly established. Significantly, however, Judge Ervin, writing the panel opinion, *never* cites *Barbee* in his analysis of whether "the specific right infringed was clearly established in 1982." App. 52. Instead, the panel decision relies on *Giglio*, *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976), *United States v. Miller*, 411 F.2d 825 (2nd Cir. 1969), and *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1975) as "clearly establishing" the right. Judge Hamilton, concurring in the judgment, declined to accept the panel's "clearly established" analysis; he found that the Supreme Court in 1982 had not "explicitly addressed the disclosure duties of police under *Brady*," but that the Fourth Circuit had done so in *Barbee*, a case not mentioned once in the panel opinion's "clearly established" analysis. App. 61-62.

Interestingly, once Judge Hamilton cites *Barbee* in his concurrence in the panel opinion, it suddenly becomes the "critical case" which beyond all doubt established the right in question. Petition at 21. In his dissent from the *en banc* opinion, Judge Ervin, who in the panel opinion relied on every case but *Barbee* as establishing the right in question, now jumps on the *Barbee* bandwagon, declaring that the police's duty to turn over evidence had been "clearly established in this circuit since at least 1964 [the date of *Barbee*]." App. 35. In Judge Hamilton's dissent from the *en banc* opinion, he once again proclaims *Barbee* as the clear precedent on this issue and bolsters his argument by noting that "in cases post-*Barbee*, we have consistently held that a police officer can be liable under § 1983 for the failure to disclose material exculpatory

evidence." App. 40. Notably, *none* of the three "post-*Barbee*" cases he cites ever mention *Barbee* as the Fourth Circuit precedent establishing the police officer's disclosure duties, or even mention it at all. *See Taylor v. Waters*, 81 F.3d 429 (4th Cir. 1996); *Carter v. Burch*, 34 F.3d 257 (4th Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995); *Goodwin v. Metts*, 885 F.2d 157 (4th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990). The *Barbee* decision surely cannot be hailed as clearly establishing the constitutional right in question when the panel opinion overlooked it and cases since *Barbee* consistently have failed to cite it as controlling precedent.

Finally, the Fourth Circuit's determination that the right in question was not clearly established likewise is supported by the heated debate and notable lack of consensus among the courts who have considered the question. The Supreme Court of North Carolina, in denying Jean's appeal from his criminal conviction, and Judge Boyle of the United States District Court for the Eastern District of North Carolina, in denying Petitioner's writ of habeas corpus, found that Respondents had committed no constitutional error in failing to disclose the hypnosis-related evidence. App. 73. The Fourth Circuit reversed, holding that the state's failure to disclose was a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Judge Howard of the Eastern District of North Carolina then held that Respondents were entitled to qualified immunity on Petitioner's § 1983 claims, specifically finding that the right in question was not clearly established. App. 71-73. The Fourth Circuit panel reversed, and the *en banc* majority affirmed the district court. Moreover, even the courts who have found the right clearly established have not agreed

as to when and by what case law the unlawfulness became apparent. The cardinal premise of the qualified immunity doctrine, that public officials are to be shielded from liability when they act in a legally uncertain environment, would be seriously compromised by holding Respondents here liable for conduct that learned state and federal judges of the Fourth Circuit cannot, even in hindsight, agree as to its lawfulness or unlawfulness.

IV. THE FOURTH CIRCUIT CORRECTLY HELD THAT RESPONDENTS WERE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEIR CONSTITUTIONAL DUTY OF DISCLOSURE WAS NOT CLEARLY ESTABLISHED IN 1982

Contrary to Petitioner's argument, the Fourth Circuit's opinion does not hold that, even though a police officer's constitutional duty of disclosure was clearly established, Respondents were nonetheless entitled to qualified immunity because no Section 1983 case had as of 1982 held officials monetarily liable for that particular transgression. Instead, the Fourth Circuit found that an officer's constitutional duty was *not* clearly established in 1982. As the Fourth Circuit explained:

> In sum, police officers in 1982 could reasonably have expected to be internally accountable to prosecutors for not turning over evidence in their possession . . . But the officers had no earthly idea that they would be subject to a federal cause of action for money damages when no relevant decision had held that the police's responsibility to furnish evidence to the

> prosecution was governed by federal constitutional law.

App. 21.

The Fourth Circuit's reasoning strictly adheres to the long-standing principle that the purpose of a Section 1983 action is "for vindication of *constitutional* guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (emphasis added). The Fourth Circuit properly determined that, because police officers in 1982 were not aware that their conduct violated any constitutional guarantee, Respondents were entitled to qualified immunity. That is a far cry from Petitioner's suggestion that the Fourth Circuit, in conflict with "nearly every other circuit in the country," will now grant qualified immunity to every government official unless there exists "a specific monetary liability case [ ] on point." Petition at 25.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted this 15 day of January, 1999.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION
CIVIL ACTION FILE NO.: 4:94-CV-62-H2

LESLY JEAN, Plaintiff v. DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually, Defendants	AFFIDAVIT OF DELMA G. COLLINS

1. I am Delma G. Collins and I am competent to make the statements contained herein based upon my personal knowledge.

2. I am currently the Assistant Chief of Police in charge of Investigatory Services for the Jacksonville, North Carolina Police Department. I have been employed with the Jacksonville Police Department since 1970. I worked my way up through the ranks of the Department from a patrol officer to my current position. During July-December, 1982, I held the rank of Captain with the Jacksonville Police Department.

3. During July 1981, I received training from the State of North Carolina at its Justice Academy in Salemburg to hypnotise [sic] witnesses in criminal investigations. The requirements for acceptance into the

program where I received this hypnosis training were ten years of experience on a police force and a recommendation from the police department. Over 150 law enforcement officers applied for this training program, but only 14-16 were accepted. I was told that the persons accepted were the cream of the crop of law enforcement officials.

4. The training program lasted two weeks, five days per week, and eight hours per day. Dr. Stan Riesess, a Psychiatrist from Charlotte was one of the instructors. He performed approximately eighty to eighty-five percent of the training. I received intense training. Dr. Riesess and the other officials hired by the State to train the class appeared to me to believe quite strongly that hypnosis was scientific. They also appeared to me to approach our training in hypnosis as a science class. My perception of the training I received was that the instructors believed that hypnosis was the solution or cure for faulty conscious memories. They appeared to me to believe that hypnosis was the tool to unlocking existing memories trapped within the subconscious mind. They trained me on how to perform hypnosis and I performed several hypnoses while receiving training. Likewise, I was hypnotised [sic] during this training. Where further information was needed from a witness who had provided a partial description of a suspect, I was trained to base my questions on information already known, which, in hindsight, may appear to be impermissibly leading or suggestive. In any event, I emerged from this two-week indoctrinating class with a total belief in hypnosis as a tool for unlocking stored memories. At all times, I had a good faith belief that hypnosis was extremely reliable and truly unlocked, not created, memories stored inside of a

person's subconscious. I believed hypnosis was the catalyst which sparked the flow of memory between the subconscious and the conscious portion of the brain. I also emerged from my training believing that the opponents of hypnosis were medical doctors or psychologists who, in large part, were not fundamentally opposed to hypnosis, but had a monetary interest in limiting hypnosis to medical doctors and psychologists. During the early 1980s, one could hear arguments from all over the spectrum concerning hypnosis in law enforcement investigations. Standards or procedural safeguards concerning how to conduct a hypnosis for law enforcement purposes also varied widely.

5. In 1982, hypnosis was legal in North Carolina and, although fragmented controversy existed among the legal and medical communities, especially in other states, the officials retained by the State of North Carolina who trained me were zealously in favor of the liberal use of hypnosis.

6. Since 1981, I have been a member of the North Carolina Association of Law Enforcement Hypnotists. I have even served as President of the Association. Since 1981, the Association has met and, during these meetings, often discussed new material concerning hypnosis. I also reviewed training brochures on hypnosis periodically.

7. Once I was trained in hypnosis, I performed hypnosis for the Jacksonville Police Department and other law enforcement agencies. Before the *Jean* case, I performed hypnosis approximately 16-20 times in investigations. In addition to performing hypnosis for the Jacksonville Police Department, I performed hypnosis for

law enforcement agencies in Lenoir County, the City of Kinston, and for either Craven County or the City of New Bern.

8. On the afternoon of July 22, 1982, Detective Stephen Smith requested me to hypnotize Jacksonville Police officer James Shingleton in reference to the description of a suspect Officer Shingleton had stopped during the early morning hours of July 21, 1982, on Highway 24 in Jacksonville, North Carolina. I was informed that this suspect matched the description of an assailant who had committed rape and sexual assault nearby. I was informed that Officer Shingleton had reached the extent of his ability to recall identifying features of the suspect. From conversations with Detective Smith, I believed all other investigative methods concerning Officer Shingleton's identification of the suspect had been exhausted so I agreed to hypnotize Officer Shingleton.

9. During the hypnosis of Officer Shingleton, I followed the training I received to the best of my ability. Detective Smith told me he had completed a report of what Officer Shingleton had remembered so I believed this report served as the pre-hypnotic report of Defendant Shingleton's knowledge. Pursuant to my training, I tape recorded the session. I also completed a hypnosis work sheet. From talking with Detective Smith, I believed that all necessary information surrounding the hypnosis was recorded either by Detective Smith or was otherwise preserved on the audiotape. From these items, pre- and post-hypnotic memory can be obtained.

10. At all times, I acted in good faith and tried not to influence or implant memory into Officer Shingleton's

mind. I used the information he had already provided as the foundation and tried to probe him to unlock the memories of what he had seen. Pursuant to my training, I believed that his subconscious mind had recorded the entire incident and hypnosis was the catalyst to getting his conscious memory to remember the incident fully.

11. During the hypnosis, Officer Shingleton began remembering exact conversations he had with Jacksonville Police Dispatch. I certainly did not plant these memories into his consciousness. In fact, I did not implant any memory into his consciousness. I emerged from the hypnosis believing that he simply relaxed to the point where he remembered the events that occurred on July 21, 1982, in an environment free from the stresses and strains of outside influences. At trial, Officer Shingleton testified that he was *not* 100 percent sure that Mr. Jean was the person he saw during the early morning hours of July 21, 1982. At no time did hypnosis strengthen his memory to the point of fanatical certainty where such certainty did not otherwise exist.

12. On July 30, 1982, Mrs. Alice Kathleen Wilson consented to hypnosis upon the recommendation of Detective Smith. Mrs. Wilson had been the victim of a rape and sexual assault 9 days earlier. Mrs. Wilson had received medical treatment and, although she was upset by the rape when it occurred, she was calm before, during and after the hypnosis. She appeared to me to be willing and emotionally able to go through hypnosis. Before the hypnosis, she assured me that she was willing and emotionally able to go through hypnosis. She did not appear to me to be then in a current state of trauma.

13. I got permission from the Chief of Police to hypnotise [sic] Mrs. Wilson. I relied on the advice and consent of my superior officer to hypnotize Mrs. Wilson. At no time before, during or after the hypnosis did my opinion change as to her ability to go through hypnosis without emotional trauma. She was not then undergoing medical care, so there was no medical provider with whom I needed to consult before hypnotizing her. I had been assured by Detective Smith that she had reached the extent of her memory and that there were no other investigatory techniques available to restore her memory.

14. The main purpose of the hypnosis was to relax her and get her into a state of comfort and complete security so she would not fear harm from remembering the rape and assault. The last thing I wanted to do was to create a situation where she would, in effect, be raped all over again as if it was actually happening to her again and for her to face, in her mind, the threat of death. I wanted her to view the rape without experiencing it. I hoped that she would be able to view the rape and better describe the rapist. I based my questions upon the information she had provided. She had provided the factual/informational foundation on which I developed my questions. At no time did I intend, nor did I believe, I created false memories in her mind. I did the best I could under the circumstances faced with the uncertainties of the case and my knowledge of hypnosis at the time.

15. I inquired as to why a picture had made her feel sick. She had stated that the picture made her feel sick and I simply tried to unlock the subconscious basis for this memory. Again, she had laid a foundation upon which I formulated and asked questions. It could have

very well been that she would have remembered a situation involving a person unconnected with the rape who looked like the person in the picture. Such a circumstance would have cleared her memory and allowed her to focus upon the characteristics of the rapist, thus clearing the person in the picture. I was simply acting in good faith to get her to unlock the reasons why this picture made her feel sick. At no time did I act with the intent to cause her to identify incorrectly Mr. Jean as the assailant. In fact, I do not believe the hypnosis caused her to identify Mr. Jean incorrectly as her assailant. She subsequently picked his voice out of a voice exemplar and made a positive identification at a show-up based upon features not visible in the photograph in question.

16. After the hypnosis ended, I believed that it was not productive. In my opinion, it certainly did not create exculpatory evidence or evidence material to Mr. Jean's defense based upon my knowledge and understanding of the law concerning hypnosis as it existed in 1982. I thought all we had gained was that the assailant's accent was possibly Puerto Rican where we had known before that it was not southern United States. Also, the assailant's shoe laces, which can be changed by an [sic] person at anytime without anyone noticing, changed from white to black. This was not a reason to celebrate thinking that we had our man. I have attached a chart, which was prepared by Special Deputy Attorney General (now retired) Richard N. League that was used in the State of North Carolina's Brief to the Fourth Circuit during Mr. Jean's habeas corpus case. I adopt the statements as to her pre- and post-hypnotic memory as my own

because they accurately depict my knowledge and understanding of how the hypnosis session was not productive nor did it substantially alter or create in Mrs. Wilson [sic] memory that lead to Mr. Jean's conviction.

17. Before the *Jean* trial, I hypnotised [sic] Assistant District Attorney Walter Wayne Vatcher on a matter not relevant to the *Jean* case. I explained to him my methods and the documents and other recordings which are created as a result of hypnotizing a witness.

18. Assistant District Attorney Vatcher knew of the documents and recordings concerning the hypnosis of Officer Shingleton and Mrs. Wilson. I informed Assistant District Attorney Vatcher of my possession of these items and he acknowledged my possession of them. He never requested me to turn them over to him or to Mr. Jean's defense counsel.

19. At no time did I receive a copy of any discovery request, either oral or written, directing me to turn over items concerning the hypnosis to Mr. Jean's criminal defense counsel. If I had received such a request, I would have turned over the items to Assistant District Attorney Vatcher, as attorney for the State.

20. At no time did I intentionally withhold this evidence from Mr. Jean's criminal defense counsel.

21. I believed that the hypnoses performed in the *Jean* case revealed only *inculpatory* evidence. Because of this belief, it did not occur to me that I had a duty to bypass the District Attorney's Office and deliver these items directly to Mr. Jean's criminal defense counsel. Even with evidence material to the defense, I was trained

that my duty is to inform the District Attorney's Office of the evidence and turn it over to that Office when requested. I believe I would only have an obligation to bypass the District Attorney's Office and go directly to the trial judge or defense counsel if I perceived that the District Attorney's Office was withholding material or exculpatory evidence. I have never been involved in such a situation. Likewise, I have never known the Onslow County District Attorney's Office to perform such acts.

22. I never acted with malice, actual or implied, towards Mr. Jean.

23. I did not create the voice exemplar.

24. While I was present at the showup, I was not the lead investigator on the case.

25. I was not responsible and I did not participate in the making or the selection of the pictures of Mr. Jean and the other suspects shown to Mrs. Wilson.

26. At no time did I learn of evidence that negated probable cause to believe that Mr. Jean had committed the rape and sexual assault of Mrs. Wilson. At all times during the investigation in 1982, the evidence obtained progressively strengthened the case against Mr. Jean.

27. In 1995, it is easy to look back at a 1982 investigation and investigatory techniques with the benefit of more complete hindsight knowledge and make judgments as to what should or should not have been done, but I believe this ignores the practical realities and uncertainties involved in such a criminal investigation as it develops from day one. Decisions had to be made based

on the resources we had and using the investigatory techniques that the State of North Carolina taught.

28. At no time during the investigation did I or anyone in the Jacksonville Police Department who was known to me acquire additional information casting doubt upon Mr. Jean's guilt that was not made known at trial in front of the jury. At all times, I availed myself of information that was reasonably available to me and at all times, I believed Mr. Jean was guilty.

29. At no time in my career as a police officer has anyone ever trained me that I was responsible for deciding what evidence should be provided to a defense counsel in a criminal case in lieu of providing it to the District Attorney's Office. Likewise, I have never been trained that I am responsible for deciding what evidence will be presented at trial. At all times, I have been trained that the above-mentioned duties are the duties of the District Attorney's Office.

30. I was not at the trial of Lesly Jean.

Further Affiant saith naught.

/s/ Delma G. Collins
Delma G. Collins

STATE OF NORTH CAROLINA
COUNTY OF ONSLOW

I, Crystal D. Keel, a Notary Public in and for said County and State, do hereby certify that DELMA G. COLLINS personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and notarial seal, this the 11 day of April, 1995.

/s/ Crystal D. Keel
Notary Public

My Commission Expires:

11/29/99

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* * * *

The minimal likely effect of hypnotism on the trial testimony of the witnesses is also starkly pointed up by comparisons of their pre-hypnotic descriptions, descriptions under hypnosis and at-trial descriptions of Petitioner. These show the descriptions were neither generally poor in content nor inaccurate overall, *United States v. Hughes*, 716 F.2d 234, 241 (4th Cir. 1983). In Ms. Wilson's case, there were apparently four pre-hypnosis descriptions within 24 hours of the crime – one at the scene, shortly after the intruder had gone; one later in the morning to the lead investigator; a handwritten statement about the same time; and one to the SBI on that afternoon for purposes of making the composite (App 340-342). A pre-hypnosis form also indicates some discussion of characteristics on July 30 (App 238). Five reports reflect these and Column 1 below is a combination of the described features from those reports[6]; the astericks [sic] in Column Two reflect the items Petitioner argues are new and suspect.

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[6] The descriptions in these reports and the testimony about them are set out individually at App 178-184 plus App 238.

Pre-Hypnosis Description From View from the Time of the Crime	Description During Hypnosis	At-Trial Recollection of View From the Time of the Crime
Black race		Dark skinned
5'8", 5'8"-6'?		5'8"
Light coloration (police officer); Dark coloration (SBI)		
160-170, 165-170, 180(?) lbs.		165 lbs.
Medium build/muscular		
Some accent	*Possibly Puerto Rican accent	"Smooth"/possibly Puerto Rican
Early 20's		
Short black hair, close cut Military – USMC, kinky		Short close cut, USMC Kinky hair
High-top white tennis shoes/ sneakers, Nike	*White high-top shoes with Nike emblem	White high-top Nike tennis with Nike swirl
White high-top crew socks	White socks	White, almost to knee, crew
Dark or blue running shorts	Dark shorts	Dark blue, like jogging shorts
Dark pull-over shirt	Dark shirt	Dark pullover shirt
	*White shoelaces	
Eyes not brillantly white, dark, not bright and sparkly, almond-shaped eyes close together	*Gray eyes/almond shape	Not bright, almond shape
	Ears don't stick out	
Square chin	Face shape same as photograph	Square face
		Eyebrows not bushy
High cheekbones		High cheekbones
Freckle ("looked like")		Mole/freckle on cheek
		No facial hair

As can be seen, the descriptions were largely the same throughout to the extent they cover the same things; the hypnotic session dealt with very few points of description; the only truly new memory from hypnosis was that the shoes had white laces, which was not recalled at trial.

Mr. Shingleton gave one description before hypnosis, to Detective Smith. Comparisons of his descriptions from App 185-186:

Pre-Hypnosis Description From View at Time of Interception	Description During Hypnosis	At-Trial Recollection of Description From the Time of Interception
Black	Black	Black
5'10"	5'10"	5'9" – 5'10"
170	*180	
		Jamaican accent
High-top tennis shoes	White high-top basketball shoes	White basketball type tennis shoes
	*White shoelaces	White shoelaces
White knee high socks	*Knee-high white socks with two 1-inch blue stripes	White
Blue shorts	*Blue elastic jogging shorts without stripe	Blue jogging shorts with white trim
Blue shirt with writing	*Blue short-sleeve pull-over with something dark on chest	Blue
Close cut hair	Short hair, no part	
Mustache	*Clean shaven	No Mustache, but testified that before hypnosis, suspect had a mustache.
	*Baby faced	
	Four-inch forehead	
	Thin eyebrows	
	*Glassy eyes	
	*Full cheeks	
	No moles or scars	
	*Big nose	
	*Oval jaw	Long face
	*Big lips/bottom lip larger	

Again, the characteristics marked with asterisks are those Petitioner contends show the dangers of hypnotism were present

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

CIVIL ACTION FILE NO.: 4:94-CV-62-H2

LESLY JEAN, Plaintiff v. DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually, Defendants	)	AFFIDAVIT OF JAMES SHINGLETON

1. I am James Shingleton and I am competent to make the statements contained herein based upon my personal knowledge.

2. I am currently a Detective with the Jacksonville, North Carolina Police Department. During July-December, 1982, I was a patrol officer with the Jacksonville Police Department.

3. During the early morning hours of July 21, 1982, I heard reports of a rape and sexual assault occurring at 104 Sherwood Drive in Jacksonville. Soon after hearing reports of the rape and sexual assault, I was travelling on Highway 24 near that location when I spotted a male

matching the description of the rapist walking beside of the road.

4. I turned on the blue lights of my patrol car and stopped. I told the male he was a suspect to a rape and that I wanted to ask him a few questions. I asked him to turn around and place his hands against my patrol car. By the light of both my patrol car's headlights and flashing blue lights, I could see him. He then fled into the nearby woods. I yelled for him to stop and drew my service pistol. I thought about shooting him, but did not do so because, pursuant to my training, I realized that I did not have probable cause to believe he was a dangerous fleeing felon. I immediately called for backup and attempted to find him. Other Jacksonville Police Officers and United State Marines Corps Military Police Officers responded to my call and assisted me in the unsuccessful search for him.

5. Over the course of the next 24-36 hours, I tried hard, probably too hard, to remember his exact description. I knew if I saw him again, I could identify him. Putting what I saw into words that could be understood for a sketched artist, however, was not possible at that time. I was stressed and tense.

6. After I had tried my best to remember everything and with no other investigatory techniques available to my knowledge, Detective Steve Smith asked me to undergo hypnosis. I had generally heard about hypnosis and believed it to be highly productive so I agreed to be hypnotized. I was not receiving any medical treatment nor did I feel it was medically unsafe for me to be hypnotised.

7. I believe that the hypnosis, conducted on July 21, 1982, was therapeutic in nature because it helped me to relax and remember events.

8. The clothing recovered from Mr. Jean's locker matched the clothing I saw him wearing on the morning of July 21, 1982 when I stopped him on Highway 24, just before he fled into the woods. No one in the Jacksonville Police Department, including Officer Collins, had seen the clothing in Mr. Jean's locker before I was hypnotised.

9. I am bewildered by the allegations that I withheld exculpatory or material evidence. If hypnosis was so drastic that it altered my memory as a witness to events I saw, it seems impossible to me that I should have been expected to realize that these memories, my memories, are not true and accurate. Back in 1982, hypnotically refreshed testimony was admitted in North Carolina's courts and believed by me and other law enforcement officials known to me to be highly effective.

10. On the night on July 26, 1982, I was called to the Dunkin Donuts near where the rape occurred and near where I had confronted the suspect who fled. I got out [sic] my patrol car, saw a man who turned out to be Lesly Jean, and immediately recognized him as the man who I saw on the Highway 24 just after the rape and sexual assault occurred. I identified him without hesitation and without having previously seen his photograph. When I later saw the clothing from his footlocker, I recognized it as being the clothing I saw on him on Highway 24 just after the rape occurred. Before I was hypnotized, I stated that I thought I could identify the person who I saw on

Highway 24 if I saw him again. I believe that my identification of Mr. Jean was based upon my pre-hypnotic memory. In any event, at no time did I act in bad faith to identify Mr. Jean while believing he was not the person who I encountered on Highway 24 just after the rape occurred.

11. I did not have the documents and recordings concerning my hypnosis or the hypnosis of Mrs. Wilson in my possession, custody, or control. I believed that Assistant District Attorney Walter Wayne Vatcher knew of the existence of the items and where they were stored. In 1982, the working relationship between the Jacksonville Police Department and the District Attorney's Office was a close one. The other officers who I observed and I worked well and were frank with Assistant District Attorney Vatcher about evidence believed to be exculpatory or otherwise material to the defense. No one I knew, including myself, wanted to carry around the guilt of sending an innocent person to jail as the result of failing to inform the District Attorney's Office of exculpatory or material evidence. Upon information and belief, Mr. Vatcher had discussions while I was present with him and with either Officer Collins or other members of the Department as to the existence of the items relating to the hypnoses and the other identification procedures used. I was never asked to turn these items over to Assistant District Attorney Vatcher or to Mr. Jean's defense counsel.

12. At no time did I receive a copy of any discovery request or an oral request directing me to turn over items concerning the hypnosis to Mr. Jean's criminal defense counsel. If I had received such a request, I would have notified Assistant District Attorney Vatcher, as attorney

for the State, of the fact that I did not have any such items and tried to direct him as to where he may obtain them. If I truly had believed that exculpatory or material evidence was being withheld from Mr. Jean's lawyers by any member of the Jacksonville Police Department or the District Attorney's office, I would have done the morally correct thing and informed the trial judge, the Honorable Herbert O. Phillips, III, or circumvented normal procedure and directly informed Mr. Jean's lawyers of the evidence.

13. Attached are portions of the transcript of my testimony at Mr. Jean's criminal trial. This testimony shows that I remembered the hypnosis and described *for the jury* how my description of the person I encountered changed as a result of the hypnosis. As reflected in that transcript, I believe my testimony showed to the jury that the questions asked me during the hypnosis were suggestive even though that was not the point I intended to make. Likewise, I do not believe the questions were suggestive, but were founded upon the facts known at that time. The jury had knowledge: that I was hypnotized; that my description of the person I encountered changed "a great deal" during the hypnosis; that I "found out" new identifying features during the hypnosis; and that I was not 100% sure that the person I encountered on Highway 24 was Mr. Jean, although I believed it was him. Since the State stipulated at trial that the partial prints from the general area of my patrol car where the person who I encountered had placed his hands did not match Mr. Jean's prints, the jury had evidence material to Mr. Jean's defense presented to it. In front of the jury, I freely admitted facts upon which the jury could have found that Mr. Jean was not the person who I stopped on Highway

24 just after the rape. In fact, based on the discrepancies in my testimony, which I obviously did not withhold from the jury, the jury could have easily found that a person other than Mr. Jean, who looked liked [sic] Mr. Jean and who matched the description of the rapist, was in the vicinity of the rape immediately after it occurred. I believe the evidence purportedly withheld could have done little more than my admission that the suspect's physical features changed and that "[m]y memory improved a great deal," both as a result of hypnosis. I freely admitted the point in front of the jury so that, in my opinion, the facts leading to this point were somewhat cumulative.

14. At no time did I intentionally withhold evidence from Mr. Jean's criminal defense counsel.

15. At all times, I had a good faith belief that the memories I had were genuine.

16. I never acted with malice, actual or implied, towards Mr. Jean.

17. I did not create the voice exemplar.

18. I was not present at the showup where Mrs. Wilson identified Lesly Jean as the rapist. I was not responsible for organizing or supervising the show-up. Detective Smith was the lead investigator. Likewise, I was not responsible and I did not participate in the making, selection, or showing to Mrs. Wilson of the pictures of Mr. Jean and the other suspects.

19. At no time did I learn of evidence that negated probable cause to believe that Mr. Jean had committed the rape and sexual assault of Mrs. Wilson.

20. In 1995, it is easy to look back at a 1982 investigation with knowledge gained in the interim and judge it harshly. This does not mean that every investigation in which I was involved to any degree is flawed, but just that with perfect knowledge, the right course of action becomes clearer and courses of action, which appeared wholly reasonable at the time, may no longer be reasonable because of subsequent learning and understanding. This is what I believe has happened with the *Jean* case. In 1982, we did not have the benefit of hindsight, but had to act according to what we believed was right at that time.

21. At no time in my career as a police officer have I been trained that I am responsible for deciding what evidence will be presented at trial or disclosed to a criminal defense counsel in response to legal discovery requests.

22. At no time during 1982 did I believe Assistant District Attorney Vatcher was doing anything wrong, but I am not a lawyer.

23. I did not sit at the prosecutor's table during the trial of Mr. Jean. I was in the courtroom, however, when Assistant District Attorney Vatcher held up a nightgown and asked Mrs. Wilson, who was on the witness stand, whether she was wearing the nightgown when she was raped and sexually assaulted. Immediately after Assistant District Attorney Vatcher asked Mrs. Wilson this question, Mr. Jean nodded affirmatively in full view of everyone, including the jury.

Further Affiant saith naught.

/s/ James Shingleton
James Shingleton

STATE OF NORTH Carolina
COUNTY OF ONSLOW

I, Crystal D. Keel, a Notary Public in and for said County and State, do hereby certify that JAMES SHINGLETON personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and notarial seal, this the 11 day of April, 1995.

/s/ Crystal D. Keel
Notary Public

My Commission Expires:
11/29/99

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* * *

[p. 416] A I was with him approximately three or four hours.

Q I mean up until you released him to Detective Smith?

A Approximately 20 minutes, sir.

Q Thank you very much, sir.

MR. VATCHER: That's all I have.

COURT: Any cross examination?

MS. MOORE: Yes, your Honor.

COURT: Go ahead, please.

CROSS EXAMINATION by MS. MOORE:

Q Officer Shingleton, let's begin by going back to the highway – where was it, Highway 24?

A 24, yes, ma'am.

Q And you stated you turned around and headed east and you saw a black male on the right side of the road. Was it the right side or left side?

A It would be the right side. Initially, when I first observed him, I was going westbound. The subject was on the eastbound.

Q You stated this area was rather dark?

A Yes, ma'am.

Q And you had to use your headlights and blue lights to be able to see?

A No, ma'am. When I first stopped him, that's when I activated the blue lights. When I first observed him, he was coming up the hill towards the blinking light.

[p. 417] Q He stopped when you told him to stop, this person?

A Yes, ma'am.

Q And you began to question him about where he had been?

A Yes, ma'am.

Q Now, you stated that the person that you stopped told you that he had been to see some friends?

A He had been to a friend's house.

Q Did you try to search him at that time?

A No, ma'am, I did not.

Q Did you advise him that he was a suspect of any kind?

A After I put his hands on the hood of the car, yes, I did.

Q Now, what part of the car did you put his hands on?

A It was on the left front fender, right above the tire.

Q And you stated you had, another person had to put their hands on the car also?

A Yes, ma'am.

Q What is the purpose of having their hands on the car?

A When I talk to anybody, I like to make sure they don't have any weapons.

Q Isn't it also to get fingerprints if you need them?

A No, ma'am.

Q Isn't it to take fingerprints?

A No, ma'am, it's not standard procedure.

Q That's not standard?

A No.

[p. 418] Q On this particular evening, did anyone come out to take fingerprints off of the car?

A No, ma'am, not that evening.

Q When were the fingerprints taken off?

A I believe it was dusted for prints the following day.

Q The following day? And where was that?

A That was in back of the police department.

Q Were you present when that was done?

A Yes, ma'am.

Q And did you advise – who took the fingerprints?

A The evidence technician, Lieutenant Buchanon.

Q Lieutenant Buchanon? And did you advise Lieutenant Buchanon where the person had stood, the two people had stood?

A Yes, ma'am.

Q And he took both of the fingerprints as far as you know?

A As far as I know, the only thing he was able to secure off the vehicle was a partial palm print.

Q All right. You also stated that the person that you stopped was wearing some white tennis shoes?

A Yes, ma'am.

Q And they were hightops?

A Yes, ma'am.

Q Now, isn't it – is it unusual in the summertime for black males to wear high-top tennis shoes?

MR. VATCHER: Objection, your Honor.

[p. 419] COURT: Overruled.

Q If you know?

A No, ma'am.

Q And what about shorts and tops?

A No, ma'am, not when you're jogging.

Q So, most people wear these during the summer, do they not?

A Yes, ma'am.

Q The only distinctive feature that you are – about the person you stopped was, according to your testimony or according to what you were told, is that he was 5'9" or 5'10" and a black male?

A No, ma'am. Also that he had on blue shorts and T-shirt with white tennis shoes. That's the description that was given out.

Q So, you cannot positively say that those white tennis shoes or those blue and white shorts or that blue shirt belonged to the person you saw that night, can you?

A No, ma'am, not positively.

Q Now, you stated that they are similar in type?

A Yes, ma'am.

Q Now, you also stated that – well, let me ask you, were you hypnotized at any time concerning this particular case?

A Yes, ma'am, I was.

Q And who hypnotized you?

[p. 420] A Detective Captain Collins.

Q And when was that done?

A That was done on the 22nd.

Q The 22nd of July?

A Yes, ma'am.

Q And what happens when you're hypnotized?

A I don't really know other than you're asleep or your conscious or your subconscious goes to sleep and you [sic] subconscious takes over your thoughts.

Q What was said to you, if you know?

A He asked basic questions as to the physical description of the individual that I had stopped on Highway 24.

Q And what description did you give him at that time?

A Black male, approximately 5'9", wearing a blue shirt, blue shorts, white high-top tennis shoes, white socks, and I believe they had a blue stripe on the top of the white socks.

Q Now, do you recall what color shoe strings were in his shoes?

A No, ma'am.

Q Isn't it usual or usually white shoe strings in white tennis shoes?

MR. VATCHER: Objection, your Honor.

Q If you know?

COURT: Overruled.

A Usually you wear white laces with white tennis shoes, yes, [p. 421] ma'am.

Q So, wouldn't those black shoe strings be distinctive in your mind?

A Ordinarily, yes, ma'am. That's when you were looking for it.

Q So, you can't remember if there were black shoe strings in those tennis or not, can you?

A No, ma'am.

Q Now, let's go back to your hypnosis. Now, could you tell the Court and jury exactly what happens when you're hypnotized? That's what I need to know.

A Described in my own words? Detective Captain Collins asked several questions and in order for me to relax and kind of put me in a sleepy mood and very relaxed mood, and once I was there he asked several questions. And I described the instant from start to finish.

And the questions he did ask – or one particular question was, I believe, on the night that the incident

occurred, which was the 21st, that I imageined [sic] some type of design on the, this T-shirt, which under hypnosis we found out it was not a design, but which was instead sweat mark. Evidently the individual had been running or jogging.

Q Okay, what else?

A There were some discrepancies, I believe, on the initial identification of the assailant in that my physical description [p. 422] of his face was somewhat vague and under hypnosis there, the questions that I had – for instance, whether the individual I had, on the night in question, I thought he had a mustache, but under hypnosis we found out that he did not have a mustache.

Q Can you think of anything else that was, that changed under hypnosis?

A No, ma'am, that's the only thing that I can recall.

Q So, now, prior to being hypnotized you thought that the person you saw out on Highway 24 had a mustache?

A Yes, ma'am.

Q Was there any other distinctive factors that you noticed about the face of the person that you saw on Highway 24?

A I believe there was a discrepancy as far as the width of the nose.

Q And what was your idea of the width of the nose before the hypnosis?

A I don't remember, really recall what the whole discrepancy was.

Q Do you recall seeing any freckles on the person out on Highway 24?

A No, ma'am.

Q What about any black moles on the face?

A No, ma'am, none that I can recall.

Q Now, after the hypnosis, well, you stated that you thought [p. 423] you saw some marks of some kind of writing on the T-shirt?

A Yes. I thought I initially saw a design on the T-shirt.

Q Now that was your initial thinking, was it not?

A Yes, ma'am.

Q Now, I'm going to ask you if there is any type of design on this T-shirt, if you know?

A Other than the left sleeve, no, ma'am.

Q Do you see any sweat marks?

A No, ma'am.

Q And initially you thought that that person had a mustache?

A Yes, ma'am, initially.

Q Now, what made you change your mind except for being under hypnosis?

A Well, I wasn't really positive. I believe when I first give the man from SBI lab was doing the Identikit, I

believe I was kind of hesitant about portion of the individual's facial features. That was something I couldn't get right in my mind, whether he did or did not have a mustache. I thought he had a mustache.

Q And you really wanted to be sure?

A Yes, ma'am.

Q Now, after the hypnosis, though, you decided that this man didn't have a mustache?

A No, ma'am, he did not after the hypnosis. He did not have a mustache.

[p. 424] Q Or was it after you went to the Dunkin Donuts and saw the defendant at the Dunkin Donuts that you decided he didn't have a mustache?

A No, ma'am. I was hypnotized before I arrested the defendant at Dunkin Donuts.

Q Officer Shingleton, you were with the person at the, on Highway 24 approximately how long?

A Approximately a minute and a half to two minutes at the most.

Q So, you can't be positively sure that that person was this defendant, can you?

A Not absolutely sure, no, ma'am.

Q So, when you went to Dunkin Donuts, did you say that looks like the man or I'm positively sure that that's the man?

A No, ma'am. My statement was to my superviser that that is the man.

Q That is the man?

A Yes, ma'am.

Q And what makes you so sure that that is the man?

A That's the feeling I had from my encounter with the individual on the 21st, that the defendant is the subject I had the encounter with.

Q After seeing that person only one minute and one half?

A Yes, ma'am.

Q And were you standing face to face with him the whole, [p. 425] entire one minute and a half?

A Yes, ma'am.

Q What about when he had his hands on the car?

A Then I had a profile view of the subject at that time.

Q What was that profile view?

A Similar to the defendant here.

Q Can you describe it?

A The facial features. He had the long jaw, the ears, the size of the lips, upper and lower lips.

Q Did you write any of this down at that time or when you came back to the station? Did you take any notes about what you saw?

A No, ma'am, I didn't have time.

Q Did you take any notes about what you saw at any time prior to today?

A Yes, ma'am. I had some notes that I jotted down previously, on the night of the 21st, which was just my own physical description of the individual's clothing, where he had gone into the woods.

Q And when did you write that?

A That was after I came out of the woods across from – between 7:30 and quarter to 8.

Q What did those notes say, if you can remember?

A Just a black male, 5 foot 9, blue T-shirt, blue shorts, white tennis shoes.

[p. 426] Q Do you recall whether – what type white tennis shoes?

A They were just the hightop, similar to basketball shoes.

Q So, you don't know whether it had any black stripe or not, do you?

A No, ma'am.

MS. MOORE: I have no further questions of this witness.

COURT: Anything on redirect?

MR. VATCHER: Yes, sir, your Honor.

REDIRECT EXAMINATION by MR. VATCHER:

Q Patrolman Shingleton, as a result of the hypnosis, did your memory of the events improve or become worse?

A My memory improved a great deal, sir.

Q Now, you indicated to Miss Moore that you jotted down some initial notes on the 21st. Did those notes ever mention anything about facial hair?

A No, sir.

Q Thank you very much, sir.

MR. VATCHER: That's all I have, your Honor.

COURT: Thank you.

MS. MOORE: I would like to ask Officer Shingleton one more question.

RECROSS EXAMINATION: by MS. MOORE:

Q Do you happen to have those notes present?

A No, ma'am.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

CIVIL ACTION FILE NO.: 4:94-CV-62-H2

LESLY JEAN, Plaintiff v. DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police officer with the City of Jacksonville, North Carolina, Police Department, Individually, Defendants	DECLARATION OF ALICE KATHLEEN WILSON (28 U.S.C. § 1746)

I, Alice Kathleen Wilson, pursuant to 28 U.S.C. § 1746 (1989), state as follows:

1. I am the person formerly known as Alice Kathleen Wilson. Since 1982, my name has changed and I, pursuant to Court order, am resuming the use of my former name to protect my identity from Lesly Jean. I am competent to make the statements contained herein based upon my personal knowledge.

2. On July 21, 1982, I awoke during the early morning hours by a man who raped and otherwise sexually assaulted me. The accounts of this incident have already been recorded and do not need repeating here.

3. When I was calm and days after having needed and received medical treatment so that hypnotizing was not a risk to me, Officer Delma Collins of the Jacksonville Police Department hypnotized me. Because I was hypnotized, Mr. Lesly Jean was freed and has now filed a lawsuit alleging that another person who was also hypnotized, Officer James Shingleton, and Officer Collins withheld exculpatory evidence from the prosecutor and Mr. Jean's criminal defense lawyers. This is not true because approximately one week before trial, the prosecutor, Assistant District Attorney Walter Wayne Vatcher, and I discussed the case in great detail. We specifically discussed the procedures used in my identification of Lesly Jean as the assailant and the hypnoses of Officer Shingleton and me. During this conversation, we also discussed the fact that my hypnosis had been tape recorded. The prosecutor appeared to me to be highly knowledgeable about the identification procedures, hypnoses and other investigative methods used by the Jacksonville Police Department.

4. I want to try to set the record straight for this honorable Court. Mr. Jean got out of jail because I, the sole witness to the rape and assault, cannot now testify at a criminal trial in a North Carolina State Court as to the identification of the man who raped me, Lesly Jean. I cannot testify at a criminal trial because I was hypnotized. This fact does not mean that Lesly Jean is innocent of raping me. He is not innocent.

5. I want the Court to know that I was hypnotized, not rendered brain injured. I remember what occurred during the hypnosis and how my memory changed as to some details. I also know what I saw the night I was

raped and assaulted. I can differentiate between the two. When I identified Lesly Jean as the rapist I was remembering facts from during the rape and assault, which was before I was hypnotized. My basis for identifying Lesly Jean was not compromised by the hypnosis. I had seen Lesly Jean's face clearly during the time he was in my bedroom because a light was on in my kitchen. When the attack first began, however, I was shocked and petrified with fear. At first, I tried not to look at him so that he would not think I could later identify him. I thought that if he thought I could identify him, then he would kill me. Because of this and because I was also extremely scared, I, at first, could not tell whether he was black or just very dark until he told me so. After he told me and over the remaining course of the hour and fifteen minutes he was in my bedroom, I began to take notice of his features. From previously living in San Diego, I remembered a television show I had seen which told of what to do if raped and how to try to remember identifying features of the rapist. Even so, after having gone through such a horrible experience, I was not capable of putting everything I saw into words. However, I knew what I saw. I knew that if I ever saw him again in person, I could identify him. I underwent hypnosis simply to assist in the investigation. I assure this Court that my identification of Lesly Jean was not based upon the hypnosis. In just several paragraphs, the Complaint attempts to selectively state and alter events occurring over many days and to create uncertainties as to my identification of Lesly Jean. It is true that given the magnitude of the charges and the two-dimensional, black and white photographs I saw, which failed to capture all of his identifying physical

10. From everything I observed, Officers Collins and Shingleton, as well as the other members of the Jacksonville Police Department who investigated the rape and assault, acted in good faith to capture the man who actually raped and assaulted me. In fact, from my contact with the Jacksonville Police Department, Officer Collins participated very little in the investigation and Officer Shingleton participated even less. I mainly thought of Officer Shingleton as another witness in the case whose participation was limited to seeing a person who matched the general description of the rapist a short time after the rape. The Jacksonville Police Department appeared to me to be fair and non-biased towards all suspects and potential suspects. In fact, they appeared to me to be almost too cautious in protecting the rights of the suspects, especially Lesly Jean.

11. While I was testifying at Lesly Jean's criminal trial in 1982, the prosecutor showed me a nightgown and asked me if it was the nightgown I was wearing when I was raped and assaulted. Immediately after the prosecutor asked me this question, I saw Lesly Jean nod affirmatively. He was in full view of the jury when this occurred.

12. Let Lesly Jean deny that he flunked a polygraph test in 1982 as to his innocence. Unless he is willing to commit perjury, he cannot make such a denial to this Court.

13. After the jury convicted Lesly Jean, the Court allowed him to make a statement. While he was making this statement, I understood him to be trying to explain why he was not on base when the rape and assault occurred. He, and other marines, had testified during

trial that he had been in bed on base when the rape and assault occurred.

Further Declarant saith naught.

I, Alice Kathleen Wilson, am executing this Declaration within the United States, and declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 31st day of March, 1995.

/s/ Alice Kathleen Wilson
Alice Kathleen Wilson

features, my identification of Lesly Jean may have appeared tentative to the Police at first. However, I did pick out his picture and, when I returned to the police station again before I was hypnotized, I was ready to identify his picture again. I was certain of his identity before I was hypnotized. I did not communicate my readiness clearly enough, but after the hypnosis, I selected his picture from among the others, just as I could have done and was ready to do before the hypnosis. Also, I never said Lesly Jean had a mole as big as a dime as the Complaint alleges. The composite, created after the rape and before the hypnosis, shows that the mole was not that large. After having been raped, I was trying as best I could to communicate that his complexion looked uneven where the mole was located, which was caused by a mole.

6. Based on my memory before I was hypnotized, I am sure that Lesly Jean was in my bedroom for approximately one hour and fifteen minutes and close to me for an hour of that time. Also, without knowing it was his voice at the time and without being hypnotized as to it, I identified Lesly Jean's voice as the person who raped and sexually assaulted me out of five other voices, which I thought were otherwise similar. Before I was hypnotized, I identified his accent as not being southern United States and as possibly being a Puerto-Rican from New York. I have not been exposed to many types of caribbean accents so pinpointing it as creole or Haitian was not possible for me then, anymore than it would be for me now to pick out a South American or Asian accent and name the specific country of origin.

7. Once I saw Lesly Jean in person, a flood of pre-hypnotic memories hit me. I saw identifying features that

the two dimensional photographs did not capture and that I had not sufficiently put into words before that time. In addition to other identifying characteristics, Lesly Jean's profile and the shape of his torso left no doubt in my mind he was the man who raped me. Plain and simply, I identified him by his total physical identifying features. I knew Lesly Jean was the man who raped me when his total identifying characteristics hit me in a wave of horror. After the lineup, I [sic] took me a few minutes to steady myself. The police could have had anyone else there standing with him when I viewed the line-up, and, in fact they did have two black men who I thought otherwise matched his description standing next to him, but my eyes cut straight through to him. He and I both know what occurred on July 21, 1982. He knows that I identified him based on the fact that he was in my bedroom on that date and not because I was hypnotized to believe he was the rapist.

8. Based on my being raped and assaulted, and being with him for over an hour, I will never forget him. I believe I would remember Lesly Jean and could identify him once I saw him in person even if I had been hypnotized for hours on end to *forget* him. I believe there are just some memories that are so deep that no amount of hypnotizing or time can substantially change them. I remember what occurred during the hypnosis in which I participated and it certainly did not change my memories from someone else to Lesly Jean.

9. I remember the man who raped me. That man is Lesly Jean. I pray unto this Court not to allow him to be, in essence, compensated for raping and assaulting me.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

CIVIL ACTION FILE NO.: 4:94-CV-62-H2

LESLY JEAN,
Plaintiff

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police Officer with the City of Jacksonville North Carolina, Police Department, Individually,
Defendants

AFFIDAVIT OF WALTER WAYNE VATCHER

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1. I am Walter Wayne Vatcher and I am competent to make the statements contained herein based upon my personal knowledge.

2. From 1979 to 1984, I was an Assistant District Attorney for Onslow County, North Carolina.

3. In 1982, I prosecuted Mr. Lesly Jean on charges of first-degree rape and sexual assault.

4. The District Attorney for the Fourth Prosecutorial District of North Carolina, the Honorable William H. Andrews, assigned Mr. Jean's criminal case to me. Pursuant to N.C. GEN. STAT. sect. 7A, -63, I had previously taken an oath of office and could perform the same duties of the District Attorney's when assigned by him to perform those duties. Because of the assignment of duties

from the District Attorney to me in Mr. Jean's criminal case, the North Carolina Constitution, Article IV, section 18, provided that I was "responsible for the prosecution on behalf of the State. . . . "

5. I, not Officer Delma Collins or Officer James Shingleton, performed the constitutional duties of the District Attorney for the Fourth Prosecutorial District of North Carolina on behalf of the District Attorney.

6. In Mr. Jean's criminal cases, I performed the duties of a prosecutor to the best of my ability. At all times, I acted in good faith. At no time did I step beyond my duties as a prosecutor. For the prosecution of Mr. Jean, and any acts or omissions incidental thereto, I claim prosecutorial immunity to the fullest extent allowed by the law.

7. I have had occasion to read the Complaint of Mr. Jean filed in the above-captioned action. To the best of my knowledge Officer Collins and Shingleton never withheld or suppressed any evidence. While I was acting in my prosecutorial capacity in regard to the criminal prosecution of Mr. Jean, one or both of these Officers informed me of the existence of the hypnoses and identification procedures mentioned in the Complaint. This was done months before trial during the Summer of 1982. During this same time period, the Jacksonville Police also advised me of the existence of the other evidence that Mr. Jean alleged in his Complaint was withheld from me, which included the sequence of facts and identification procedures used leading to the rape victim's identification of Mr. Jean. On one or more occasions, including one

occasion around the end of August or first part of September of 1982, I reviewed reports concerning evidence examined by the State Bureau of Investigation's crime laboratory. During this time and on many other occasions before the trial of Mr. Jean, I had discussions concerning the physical evidence and identification procedures that Mr. Jean alleges was withheld from me.

8. In 1982, an excellent working relationship existed between the Jacksonville Police and the District Attorney's Office on matters pertaining to criminal investigations and evidence establishing or defeating probable cause.

9. In executing my discretion as a prosecutor to seek an indictment and try Mr. Jean, I had to have and did, in fact, receive complete updates on the investigation, including facts concerning the identification procedures used. The Jacksonville Police were frank with me concerning the pros and cons of the case against Mr. Jean because, based upon my perceptions of them, they did not wish to see an innocent person convicted, which necessarily means that a guilty person remains free.

10. In my opinion, the identification procedures used were not impermissibly suggestive. They were not otherwise exculpatory or material to Mr. Jean's defense.

11. No one rushed to arrest Mr. Jean to quell public concerns over an at-large rapist. We waited, not because the evidence made Mr. Jean appear innocent, but because we wanted to make sure he was the rapist. As facts were uncovered during the investigation, the case against Mr. Jean became stronger, not weaker.

12. On one occasion during this time frame, Officer Collins even hypnotized me on a subject unrelated to the case. I did not request Collins to testify or produce documents. Based on my professional judgment, I believed that the hypnoses did not contain exculpatory information. I produced all information I felt was required by law.

13. Mr. Jean's criminal defense counsel learned of the hypnoses of the rape victim and Officer Shingleton on *voir dire* on Defendant Jean's Motion to Suppress Identification, which occurred before the witnesses testified at trial. In front of the jury, Mr. Jean's criminal defense counsel cross examined the rape victim on the fact that she had been hypnotized. (*See* Exhibit A). She remembered being hypnotized and the questions asked.

14. Mr. Jean's criminal defense counsel also cross examined Officer Shingleton on the fact that he had been hypnotized. Officer Shingleton testified as to how he was hypnotized and the questions asked. (*See* Exhibit B). He remembered what occurred during the hypnosis and how his description of the person he encountered changed as a result of the hypnosis. All of this testimony was given by him in full presence of the jury.

15. Officer Collins was available to testify, but Mr. Jean's criminal defense counsel did not call him to testify as to the procedures used. Mr. Jean's counsel did not request a *voir dire* on what his testimony would be concerning the methods he used to hypnotize the victim and Officer Shingleton.

16. Officers Shingleton and Collins turned over all evidence that I requested from them. I knew of the existence of the hypnoses having been conducted. I received a lengthy document from Mr. Jean's criminal defense counsel containing numerous discovery requests. The discovery did not name items concerning hypnosis by name. I turned over all the items I was compelled to do under the law at that time.

17. At no time did I act with the intent to withhold or suppress any exculpatory evidence or convict Mr. Jean improperly, nor am I aware of any other person withholding or suppressing evidence. It is my opinion that the evidence produced by the police department in 1982 was sufficient for a finding of probable cause, a trial and a conviction.

18. By filing this Affidavit, I do not waive the absolute immunity afforded to me for my acts as a prosecutor. Further I do not waive the other immunities that may be available to me, which may include qualified immunity, governmental immunity or otherwise. Further affiant saith naught.

/s/ Walter Wayne Vatcher
Walter Wayne Vatcher

STATE OF NORTH CAROLINA
COUNTY OF ONSLOW

I Lisa D. Hawkins, a Notary Public in and for said County and State, do hereby certify that WALTER WAYNE VATCHER personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and notarial seal, this the 31 day of March [LDH] 1995.

[SEAL]

/s/ Lisa D. Hawkins
Notary Public

My Commission Expires:

2/3/97

EXHIBIT A

* * *

[p. 285] I saw him at the fire station, his face, I knew him immediately, who he was and the profile and details of his face.

Q And so on the 17th of December, 1982 –

A September.

Q 17th of September, 1982, you became 100 percent positive? That that was the man, Mrs. Wilson?

A Sir, I hadn't been able to see him in person up to this time. When I saw him in person, yes, sir, I knew who he was.

Q Okay. So on the 17th of December, that's when you became 100 percent positive, isn't that correct, ma'am?

A Sir, that's when I made my identification of him, yes, sir.

Q And are you today 100 percent positive that he was the assailant?

A Yes, sir.

Q And are testifying today that your testimony was not influenced by either the pictures, anything or anyone?

A That's right, sir.

Q That this was based solely on your memory?

A Yes, sir.

Q Mrs. Wilson, do you recall if you've ever been subjected to hypnosis?

A Yes, sir.

Q Do you recall what date that was?

A No, sir.

[p. 286] Q Do you recall who did it?

A Yes, sir.

Q Who was it?

A Detective Collins.

Q And do you recall what month it occurred in?

A No, sir.

Q You don't recall whether it was September or August?

A No, sir, I don't remember if it was July or August. It was either the end of July or beginning of August.

Q And you were hypnotized by Detective Collins?

A Yes, sir.

Q You have any idea what took place or what was said to you?

A Yes, sir.

Q While you were in the hypnotic state?

A Yes, sir.

Q In other words, you were conscious?

A Yes, sir.

Q And yet you were hypnotized?

A Yes, sir.

Q And that in no way influenced your testimony at all?

A No, sir.

Q And that in no way made you positively identify an individual?

A No, sir.

Q And you were positive on your own that this is the man?

[p. 287] A Yes, sir.

Q Then why may I ask, Mrs. Wilson, did you subject yourself to hypnosis if you were so sure?

A Would you please repeat that question?

Q Yes, ma'am. If you did everything on your own, as you're certain, ma'am, you were not influenced by

anything or anyone, why would you subject yourself to hypnosis, ma'am.

A They asked me to go under hypnosis to see if I could remember anything more about the picture that bothered me so much, and I didn't remember any more about it under hypnosis than I do normally. I remembered anyway and that's it.

Q How did you know the results of the hypnosis?

A Because I know what was said during the hypnosis. You don't not remember what was said. You know what's said to you during that time.

Q Were you not placed in a state of unconsciousness at that time?

A No, sir.

Q You were conscious and understood each and ever word that was said to you and what you said back?

A Yes, sir.

Q And you gained nothing from that hypnosis?

A No, sir.

Q Except perhaps the identity –

A No, sir.

[p. 288] Q – of the picture that made you feel ill?

A No, sir.

Q Mrs. Wilson, would your testimony here today be influenced at all by a desire to avenge a crime?

A No, sir.

Q What about would it be influenced by a desire to exact vengeance on someone you believe is guilty based on laboratory reports and anything anyone else told you?

A No, sir.

Q So, as you sit here now, you have no doubt in your mind that Lesly Jean does not have a twin, does not have anybody that looks like him, that he's the one?

A That's right, sir. I have no doubt in my mind that that was the man that raped me.

Q No possibility for error or excuse?

A That's right, sir.

Q And certainly no desire, either consciously or unconsciously, to support an identification made by someone else?

A No, sir.

MR. WRIGHT: I have no further questions, your Honor.

THE COURT: Anything on redirect by the State?

MR. VATCHER: Yes, sir, your Honor.

REDIRECT EXAMINATION by MR. VATCHER:

Q Kathy, you testified that the object was placed to your head while you were in your bedroom on the 21st of July, that

* * *

EXHIBIT B

* * *

[p. 419] COURT: Overruled.

Q If you know?

A No, ma'am.

Q And what about shorts and tops?

A No, ma'am, not when you're jogging.

Q So, most people wear these during the summer, do they not?

A Yes, ma'am.

Q The only distinctive feature that you are – about the person you stopped was, according to your testimony or according to what you were told, is that he was 5' 9" or 5' 10" and a black male?

A No, ma'am. Also that he had on blue shorts and T-shirt with white tennis shoes. That's the description that was given out.

Q So, you cannot positively say that those white tennis shoes or those blue and white shorts or that blue shirt belonged to the person you saw that night, can you?

A No, ma'am, not positively.

Q Now, you stated that they are similar in type?

A Yes, ma'am.

Q Now, you also stated that – well, let me ask you, were you hypnotized at any time concerning this particular case?

A Yes, ma'am, I was.

Q And who hypnotized you?

[p. 420] A Detective Captain Collins.

Q And when was that done?

A That was done on the 22nd.

Q The 22nd of July?

A Yes, ma'am.

Q And what happens when you're hypnotized?

A I don't really know other than you're asleep or your conscious or your subconscious goes to sleep and you [sic] subconscious takes over your thoughts.

Q What was said to you, if you know?

A He asked basic questions as to the physical description of the individual that I had stopped on Highway 24.

Q And what description did you give him at that time?

A Black male, approximately 5' 9", wearing a blue shirt, blue shorts, white high-top tennis shoes, white socks, and I believe they had a blue stripe on the top of the white socks.

Q Now, do you recall what color shoe strings were in his shoes?

A No, ma'am.

Q Isn't it usual or usually white shoe strings in white tennis shoes?

MR. VATCHER: Objection, your Honor.

Q If you know?

COURT: Overruled.

A Usually you wear white laces with white tennis shoes, yes, [p. 421] ma'am.

Q So, wouldn't those black shoe strings be distinctive in your mind?

A Ordinarily, yes, ma'am. That's when you were looking for it.

Q So, you can't remember if there were black shoe strings in those tennis or not, can you?

A No, ma'am.

Q Now, let's go back to your hypnosis. Now, could you tell the Court and jury exactly what happens when you're hypnotized? That's what I need to know.

A Described in my own words? Detective Captain Collins asked several questions and in order for me to relax and kind of put me in a sleepy mood and very relaxed mood, and once I was there he asked several questions. And I described the instant from start to finish.

And the questions he did ask – or one particular question was, I believe, on the night that the incident occurred, which was the 21st, that I imageined [sic] some type of design on the, this T-shirt, which under hypnosis we found out it was not a design, but which was instead sweat mark. Evidently the individual had been running or jogging.

Q Okay, what else?

A There were some discrepancies, I believe, on the initial identification of the assailant in that my physical description [p. 422] of his face was somewhat vague and under hypnosis there, the questions that I had – for instance, whether the individual I had, on the night in question, I thought he had a mustache, but under hypnosis we found out that he did not have a mustache.

Q Can you think of anything else that was, that changed under hypnosis?

A No, ma'am, that's the only thing that I can recall.

Q So, now, prior to being hypnotized you thought that the person you saw out on Highway 24 had a mustache?

A Yes, ma'am.

Q Was there any other distinctive factors that you noticed about the face of the person that you saw on Highway 24?

A I believe there was a discrepancy as far as the width of the nose.

Q And what was your idea of the width of the nose before the hypnosis?

A I don't remember, really recall what the whole discrepancy was.

Q Do you recall seeing any freckles on the person out on Highway 24?

A No, ma'am.

Q What about any black moles on the face?

A No, ma'am, none that I can recall.

Q Now, after the hypnosis, well, you stated that you thought [p. 423] you saw some marks or some kind of writing on the T-shirt?

A Yes. I thought I initially saw a design on the T [illegible]rt.

Q Now that was your initial thinking, was it not?

A Yes, ma'am.

Q Now, I'm going to ask you if there is any type of design on this T-shirt, if you know?

A Other than the left sleeve, no, ma'am.

Q Do you see any sweat marks?

A No, ma'am.

Q And initially you thought that that person had a mustache?

A Yes, ma'am, initially.

Q Now, what made you change your mind except for being under hypnosis?

A Well, I wasn't really positive. I believe when I first give the man from SBI lab was doing the Identikit, I believe I was kind of hesitant about portion of the individual's facial features. That was something I couldn't get right in my mind, whether he did or did not have a mustache. I thought he had a mustache.

Q And you really wanted to be sure?

A Yes, ma'am.

Q Now, after the hypnosis, though, you decided that this man didn't have a mustache?

A No, ma'am he did not after the hypnosis. He did not have a mustache.

[p. 424] Q Or was it after you went to the Dunkin Donuts and saw the defendant at the Dunkin Donuts that you decided he didn't have a mustache?

A No, ma'am. I was hypnotized before I arrested the defendant at Dunkin Donuts.

Q Officer Shingleton, you were with the person at the, on Highway 24 approximately how long?

A Approximately a minute and a half to two minutes at the most.

Q So, you can't be positively sure that that person was this defendant, can you?

A Not absolutely sure, no, ma'am.

Q So, when you went to Dunkin Donuts, did you say that looks like the man or I'm positively sure that that's the man?

A No, ma'am. My statement was to my supervisor that that is the man.

Q That is the man?

A Yes, ma'am.

Q And what makes you so sure that that is the man?

A That's the feeling I had from my encounter with the individual on the 21st, that the defendant is the subject I had the encounter with.

Q After seeing that person only one minute and one half?

A Yes, ma'am.

Q And were you standing face to face with him the whole, [p. 425] entire one minute and a half?

A Yes, ma'am.

Q What about when he had his hands on the car?

A Then I had a profile view of the subject at that time.

Q What was that profile view?

A Similar to the defendant here.

Q Can you describe it?

A The facial features. He had the long jaw, the ears, the size of the lips, upper and lower lips.

Q Did you write any of this down at that time or when you came back to the station? Did you take any notes about what you saw?

A No, ma'am, I didn't have time.

Q Did you take any notes about what you saw at any time prior to today?

A Yes, ma'am. I had some notes that I jotted down previously, on the night of the 21st, which was just my own physical description of the individual's clothing, where he had gone into the woods.

Q And when did you write that?

A That was after I came out of the woods across from – between 7:30 and quarter to 8.

Q What did those notes say, if you can remember?

A Just a black male, 5 foot 9, blue T-shirt, blue shorts, white tennis shoes.

[p. 426] Q Do you recall whether – what type white tennis shoes?

A They were just the hightop, similar to basketball shoes.

Q So, you don't know whether it had any black stripe or not, do you?

A No, ma'am.

MS. MOORE: I have no further questions of this witness.

COURT: Anything on redirect?

MR. VATCHER: Yes, sir, your Honor.

REDIRECT EXAMINATION by MR. VATCHER:

Q Patrolman Shingleton, as a result of the hypnosis, did your memory of the events improve or become worse?

A My memory improved a great deal, sir.

Q Now, you indicated to Miss Moore that you jotted down some initial notes on the 21st. Did those notes ever mention anything about facial hair?

A No, sir.

Q Thank you, very much, sir.

MR. VATCHER: That's all I have, your Honor.

COURT: Thank you.

MS. MOORE: I would like to ask Officer Shingleton one more question.

RECROSS EXAMINATION by MS. MOORE:

Q Do you happen to have those notes present?

A No, ma'am. [p. 427] So I wouldn't know whether it had any mention of hair or not, would I?

MR. VATCHER: Objection.

COURT: Overruled.

A No.

Q Thank you.

COURT: Thank you Officer Shingleton, you can have a seat.

Next witness ready now, sir?

MR. VATCHER: Yes, sir, she is.

COURT: Let your witness come up.

MR. VATCHER: Joan [sic] P. Medlin, your Honor.

JONA P. MEDLIN, being first duly sworn, testified as follows during DIRECT EXAMINATION by MR. VATCHER:

Q Please state your name and occupation For the Court and jury?

A Jona P. Medlin. I'm a forensic serologist employed by the State Bureau of Investigation.

MS. MOORE: I'm sorry, I missed the first name.

MR. VATCHER: Could you spell that, please?

A J-o-n-a.

Q And what are your duties with the State Bureau of Investigation, Mrs. Medlin?

A I'm a forensic serologist.

Q Would you define that for the jury?

* * *